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No.

IN THE

Supreme Court of the United States

October Term, 1986

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, NEW YORK TELEPHONE COMPANY and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioners,

against

JOSEPH CAHILL,
Respondent.

Brief of *Amicus Curiae* in Support of Petition for a Writ of Certiorari to the Court of Appeals of the State of New York by New York Telephone Company and Central Hudson Gas & Electric Corporation

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Question Presented

Do the allegations of the respondent in his State Court petition claiming that the Public Service Commission, a petitioner herein, permits New York utilities which it regulates to make charitable contributions from customer service revenues "in any manner each utility determines" constitute the "state action" necessary to establish a cause of action for violation of the First or Fourteenth Amendments of the Constitution of the United States.

List of Parties

The parties to the proceeding below are fully set forth in the petition submitted on behalf of New York Telephone and Central Hudson Gas & Electric Corporation, dated June 22, 1987. This brief is submitted on behalf of United Way of New York State who wishes to be heard as an *amicus curiae* and has secured the consent of all parties to such submission.

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Interest of the United Way of New York State

Exactly one century ago this year, the first local United Way was formed in Denver, Colorado. The first ten decades of the United Way movement have seen it grow from the one spirited, but relatively insignificant original agency in Colorado to thousands of local United Way organizations across this country spear-headed by local volunteers serving their communities. Despite the growth of United Way, its basic goals have remained essentially unchanged—to raise by annual private contribution, as many local dollars as possible for health and human service needs and to allocate those resources to individual serving agencies in the most equitable manner consistent with fulfilling those needs.

United Way of New York State is a non-profit membership corporation established under the laws of the State of New York and organized for the avowed purpose of sharing information, expertise and other resources among various local United Ways based in New York State and to maintain a coordinated governmental relations program at the state level on behalf of all affiliated United Ways. Accordingly, the United Way of New York State has a vital interest in seeking review of the decision of the Court of Appeals of the State of New York, which if left undisturbed would undoubtedly reduce the contributions made by New York utilities to meet health and human service needs in their areas of service.

REASONS FOR GRANTING THE WRIT

A. The Holding of the Majority in the New York Court Represents a Direct Departure From the Controlling Authority of this Court on the Principle of State Action.

The "critical issue" identified by the New York State Court of Appeals was whether the challenged conduct of the private utility actually constituted "governmental conduct of an agency of the State itself." *Cahill v. Public Service Commission,* 69 N.Y.2d 265, 270 (1986). The necessity for addressing the issue of "state action" is dictated by this Court's insistence that "the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937 (1982). Although the principle of "state action" is succinctly stated and well established, the determination of whether challenged conduct is the product of measures taken by the state itself is not always easily ascertained. *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 349-350 (1974).

The applicable test set forth by this Court to resolve questions of alleged state action requires that the aggrieved party show that "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Jackson,* 419 U.S. at 351. Under this formula, facts indicating that a business is subject to extensive state regulation, as is the situation with most utility companies, are insufficient to establish a nexus between the state and the utility. *Id.* at 350. Furthermore, the mere acquiescence of the state in allowing a private party to engage in the challenged activity cannot be pos-

ited as the basis for inferring state action. *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1981). There must be an exercise of controlling or coercive power on the part of the state for it to be held accountable for the conduct of a private utility. *Id.*

The lower court divided over the question of whether the threshold requirement of state action had been demonstrated by the respondent. At the crux of this divergence of opinion is a dispute as to what conduct actually constitutes the action that is subject to interpretation. The majority members of the New York Court of Appeals chose to focus attention solely on the conduct of the Public Service Commission in approving utility rates which included charitable contributions as operating expenses. *Cahill,* 69 N.Y.2d at 272. By limiting the scope of its analysis to one aspect of the process, the Court of Appeals could not effectively apply the principle of state action.

The dissenting members of the New York Court considered instead the total process. They recognized that the fact that the Public Service Commission approved rates did not alter the character of the private management decision of the utility to make voluntary contributions to charities. *Id.* at 276. They found this Court's state action decisions controlling and noted that:

> ". . . the key to analysis in a case such as this is to subtract the government from the equation and then consider what the behavior of the private party would be without any governmental intervention at all." *Id.* at 278-279.

Upon performing such an analysis, the dissenters concluded:

> ". . . if the regulatory powers of the State were not involved in the rate-setting process, utility companies, like most unregulated business concerns, would simply include in the price for their services the cost of whatever charitable donations they may choose to make. By allowing these utilities to engage, to a limited extent, in a business practice that they would naturally have pursued if there had been no state involvement at all, the PSC has done no more than merely refuse to interfere with what is essentially a private decision." *Id.* at 279.

The characterization of a utility's conduct in donating to charitable organizations as being the product of an entirely private decision is consonant with the viewpoint held by charitable organizations with respect to such transactions. When a local United Way conducts an annual fund-raising campaign, the contributions successfully solicited from the utility are viewed in precisely the same manner as contributions from other private corporations.

Both the contributing utility and the recipient of the support regard the charitable contribution of a utility as a private transaction. The mere approval by a state commission of the concept of including charitable contributions as a business expense does not in any way alter the character of that transaction. Under the principles established in *Jackson* and *Blum,* such approval cannot convert this purely private process to one of state action.

B. If Left Undisturbed, the Decision of New York's Highest State Court Would Undoubtedly Reduce the Levels of Community Support Provided by Utilities Throughout New York State, Thereby Reducing the Effectiveness of the Thousands of Agencies Providing Health and Human Service Assistance to Innumerable Individuals Throughout the State.

One of the clear directions of governmental policies during the past seven years has been the shift away from governmental support of health and human service concerns through increased reliance on the private sector. At least part of the underlying philosophy of that policy shift is that private businesses and individuals are in the best position to assess the real needs in their community and should be in the best position to efficiently and effectively meet those needs. The decision of the New York Court of Appeals not only misconstrues and consequently conflicts with the prior authority of this Court, but it also contravenes the current governmental policy to encourage private support to meet undeniable social needs across this country.

The clear import of the *Cahill* decision is that a traditionally private decision by business somehow loses its private character because the basic concept of community support to charitable organizations has been recognized by a state agency as a legitimate business expense.

Unregulated businesses across this country recognizing the need for corporate citizenship, whether guided by public relations considerations and/or altruistic assessments of community need, contribute millions of dollars annually, not merely to enhance the quality of life for some, but in an effort to see that the basics of life are available for all. The New York State Public Service Commission

has since 1970 recognized that it is reasonable to include as part of the operating expenses of utilities in New York State the very same contributions which unregulated businesses make to fulfill their obligation as good corporate citizens.

The petition of *Cahill* in his State Court special proceeding does not allege anything more than Public Service Commission approval of this process, and, in fact, the petition expressly acknowledges that the Public Service Commission permits the New York utilities which it regulates "to dispose of their charitable contributions * * * in any manner each utility determines. . . ."

It is not claimed that the essential character of the contribution changed subsequent to the establishment of the policy in 1970. Since that time the Public Service Commission has recognized that unregulated businesses, as a normal cost of doing business, incur the expense of charitable support and that such expense should be included within the rate-making base of each individual utility, provided the amount included is consistent with the level of giving prior to the institution of the policy.

The Public Service Commission does not play any role in the actual charitable contributions made by each utility. That decision is as it always has been, a purely private decision reached by the individual utility. The utility is free to give to any legitimate charitable need, and the total amount which it gives to charitable concerns on an annual basis may be more or less than the amount approved by the Public Service Commission for inclusion in the rate-making base.

We would be the first to acknowledge that the *Cahill* decision will not result in the elimination of corporate sup-

port for charitable concerns by utilities. Support was provided prior to 1970 when the Public Service Commission first approved charitable contributions as a legitimate element in the utility rate and, even today, most utilities give a level which exceeds the amount approved by the Public Service Commission. However, it is safe to say that the *Cahill* decision will have at the very least a dampening effect on the willingness and ability of utilities to support their communities, their state and their country at the level which they have in the past.

At this time in our history when governmental policy warrants the encouragement of good corporate citizenship, any far-reaching decision at the state level which discourages community involvement and charitable support should be most closely scrutinized.

Conclusion

Public policy considerations reinforce the need for this Court to review the decision of the New York State Court of Appeals in *Cahill* and we would respectfully request that the petition for a writ of certiorari to the Court of Appeals of the State of New York be granted.

Respectfully submitted,

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